

be the Native Court of Appeal in the circumstances. Otherwise the assumption by the High Court of jurisdiction to decide upon the matter of the land in question would be in effect tantamount to the assumption of jurisdiction to decide upon a matter connected with the appeal, or to anticipate the result of the appeal. It may well be that the provisions of section 5(1)(e) of the Native Courts Ordinance oust the jurisdiction of the Native Court in this respect, but any decision as to whether this is so should, in our view, on the authority of *Manggai's* case<sup>(5)</sup> be made by the relevant appellate Native Court.

The right to appeal through the Native Court hierarchy should not be denied. If a party wishes to abandon his or her right that is his or her concern. There is nothing to say that a Native Court has no jurisdiction to deal with "*harta pencarian*". Such question should be left to the Native Court hierarchy. Whether the Native Officer's Court has jurisdiction or not is a matter for the Native Court hierarchy to decide. Until the matter has been finally decided there is nothing to prevent the learned judge from properly exercising his discretion to stay. There is no reason for us to interfere with the exercise of his discretion. Accordingly, we would dismiss the appeal with costs.

*Appeal dismissed.*

Solicitors: Reddy & Co.; Ibrahim & Co.

#### TAN PENG LOH v. LEE AIK FONG & ANOR.

[F.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Salleh Abas F.J.J.) July 7 & September 10, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 109 of 1980]

*Tort — Damages — Employee injured in accident involving lorry belonging to employer and driven by driver employed by employer — Driver to blame for accident — Whether employee entitled to claim damages from employer or from driver — Employees Social Security Act, 1969, ss. 31 & 42.*

The appellant was an employee of the 2nd respondent, the owner of a lorry which was driven by the 1st respondent. The appellant sustained injuries in a motor accident and the learned trial judge found that the 1st respondent was solely to blame for the accident. The 2nd respondent was a contributor to the Employees Social Security Scheme under the Employees Social Security Act, 1969. The learned Judge found that the injuries suffered by the appellant were employment injuries as defined by the Act and he held that the appellant was not entitled to recover damages under the common law from the employer. The learned trial judge also dismissed the appellant's claim against the driver, the 1st respondent. The appellant appealed.

**Held:** (1) by virtue of sections 31 and 42 of the Employees Social Security Act, 1969, an insured person is precluded from recovering damages from the employer in respect of an employment injury sustained by him as an employee under the common law or any other law for the time being in force;

(2) in the absence of express exclusion of claims against fellow employees in the Employees Social Security Act, 1969, the right to recover damages at common law from the 1st respondent, a fellow employee, remains;

(3) in the absence of any statutory provision to the contrary, payments recovered by the appellant under the Act are, in common law, not to be taken into account so as to reduce the damages recoverable by the appellant.

#### A Cases referred to:-

- (1) *Che Noh bin Yaacob v. Seng Hin Rubber (M) Sdn. Bhd.* [1982] 1 M.L.J. 80.
- (2) *Bradburn v. Great Western Railway* (1874) L.R. 10 Ex. 1.

#### HIGH COURT.

*Tara Singh Sidhu* for the plaintiff.

B *H.R. Sankey* for the defendants.

*Cur. Adv. Vult.*

**Abdul Hamid F.J.:** The plaintiff's claim for damages for personal injuries has been heard and the 3rd defendant lorry driver was found to be solely to blame for the accident. Damages, special and general, agreed at \$120,000 was awarded to the plaintiff against the 3rd and 4th defendants. The plaintiff's claim against the 1st and 2nd defendants was dismissed with costs.

The remaining issue is one of law namely, whether the plaintiff was entitled to sue the 1st, 2nd, 3rd and 4th defendants in view of sections 31 and 42 of the Employees' Social Security Act, 1969 (hereafter called 'the SOCSO Act').

Written submissions by the plaintiff and the defendants were submitted for my consideration.

The plaintiff was an employee of the 4th defendant Ng Yeap Phee the owner of the motor lorry driven by the 3rd defendant. The 4th defendant was a contributor to the Employees' Social Security Scheme under the SOCSO Act. It is the contention of the 3rd and 4th defendants that the plaintiff cannot maintain the action in tort against them by virtue of sections 31 and 42 of the SOCSO Act.

F On behalf of the plaintiff it is submitted that —

- (a) sections 31 and 42 are *ultra vires* Article 4(i) and Article 13 read with Article 4 of the Federal Constitution;
- (b) he is not precluded from claiming general damages for the injuries as well as loss of amenities although he might be prevented from claiming special damages for loss of earning;
- (c) he is not prevented from suing the 3rd defendant who is not the employer of the plaintiff.

G With reference to (a) above it is contended that the SOCSO Act is discriminatory in that there is no intelligible differentia which distinguishes persons left out of the group from those covered by the SOCSO Act and the differentia enacted is contrary to the object sought to be achieved by the Act which is to provide certain benefits to employees in the case of invalidity and employment injury.

H Mr. T.S. Sidhu appearing on behalf of the plaintiff pointed out that under the preamble the benefit is to be provided to all employees whereas section 3 excludes employees of industries which employ less than five and those earning more than \$500.

I I am of the view that while it may be useful in a particular case to look at the preamble for assistance to construe a particular provision in a statute and to determine the intention of the legislature the need to

do so does not arise where there is no ambiguity and the intention of the legislature is clear from the words used. In the instant case I am unable to hold that the SOCSO Act is in any way discriminatory as suggested by the plaintiff and *ultra vires* any of the provisions of the Federal Constitution.

I have read with considerable care the cases cited by Mr. Sidhu in support of his argument that sections 31 and 42 of the SOCSO Act are *ultra vires* certain provisions of the Federal Constitution. I find no merit in the argument and I am not disposed to accept that these cases apply to the present case.

It is useful to refer to section 31 of SOCSO Act which reads as follows —

“An insured person or his dependants shall not be entitled to receive or recover from the employer of an insured person —

(i) any compensation under the Workmen's Compensation Ordinance, 1952, or

(ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act.”

In the case under consideration it is not in dispute that both the plaintiff and the 4th defendant as employer were at all material times contributors to the scheme which provides for benefits for employees in case of invalidity and employment injury under the SOCSO Act. The plaintiff was an employee engaged by the 4th defendant as an attendant and was carried on motor lorry AQ 4123 owned by the 4th defendant and driven by the 3rd defendant when the accident occurred.

As a result of the accident the plaintiff suffered certain injuries which clearly arose out of and in the course of the plaintiff's employment with the 4th defendant.

The plaintiff was travelling on a vehicle provided by his employer the 4th defendant at the time the accident happened. Such accident must therefore be deemed to have arisen out of and in the course of employment (section 24 SOCSO Act). By reason of section 24 of the SOCSO Act it must also be presumed to have arisen out of that employment.

SOCSO Act defines “employment injury” to mean a personal injury to an employee caused by accident arising out of and in the course of employment in an industry to which the Act applies. It is not denied that the plaintiff was injured while employed in an industry covered by the Act. The injuries suffered by the plaintiff must therefore be held to be an employment injury as defined under the SOCSO Act.

This action is brought under the common law. The question this court has to consider is whether by reason of the section 31(ii) of the SOCSO Act the plaintiff is entitled to receive or recover from the employer damages under the common law.

In my view section 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained as an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law

remedy. The pertinent question to consider is whether the words “any other law” cover the common law. My view is that they do.

The word “law” has the meaning assigned by Article 160(2) of the Federal Constitution. (Interpretation Act 1967). Article 160(2) of the Federal Constitution defines “law to include written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof.”

Apart from section 31(ii) there is section 42 of the SOCSO Act that must be borne in mind. It reads —

“42. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other written law.”

Section 42 prohibits an insured person from receiving damages from the employer under any other law other than the common law in respect of an employment injury. The plaintiff clearly became entitled to the benefits provided by the SOCSO Act and is therefore disentitled to receive similar benefit under any other written law.

A further question has also been raised before me, namely, whether the plaintiff can recover damages from the 3rd defendant, a co-employee. To my mind, the injury in respect of which the plaintiff is claiming against the 3rd defendant is the same injury that forms the basis of his entitlement under the SOCSO Act and upon recovery of the compensation therein, I fail to see how he could proceed to recover against 3rd defendant who, at the material time, was the servant and agent of the 4th defendant, the plaintiff's employer.

Costs for 3rd and 4th defendants.

*From the above judgment the appellant appealed to the Federal Court.*

FEDERAL COURT.

Tara Singh Sidhu for the appellant.

H.R. Sankey for the respondent.

*Cur. Adv. Vult.*

Wan Suleiman F.J. (delivering the judgment of the Court): The appellant (plaintiff in the court below) was an employee of the 2nd respondent, the owner of the motor lorry which was being driven by the 1st respondent at the time of the accident. The 2nd respondent was a contributor to the Employees' Social Security Scheme under the Employees' Social Security Act, 1969 (hereinafter referred as to “the Act”).

The learned trial judge found that the 1st respondent to be solely to blame for the accident, allowing with costs the appellant's claim against the driver and owner of the other motor lorry involved in the accident (1st and 2nd defendants at the trial). It was also agreed that if, despite the provisions of the Act, damages could be recovered by the appellant, then damages, special and general, would be \$120,000.

In the court below, it was urged on behalf of the present appellant that: —

- (a) sections 31 and 42 are *ultra vires* Article 4(1) and Article 13 read together with Article 4 of the Federal Constitution;
- (b) appellant is not precluded from claiming general damages for the injuries as well as loss of amenities although he might be prevented from claiming special damages for loss of earnings;
- (c) appellant is not precluded from recovering damages from the 1st respondent (the lorry driver) who is not the employer of the appellant.

Before us, counsel for appellant abandoned ground

- (a). We do not therefore propose to refer to this ground except to say that we agree with the court below that the sections of the Act referred to are certainly not *ultra vires* any of the constitutional provisions.

In the court below the learned judge found that the injuries suffered by the appellant was employment injuries as defined in the Act, and before him, as it is before us, the question is whether the plaintiff/appellant is entitled to receive or recover from the employer damages under common law, in view of section 31 of the Act. Section 31 reads as follows:—

“An insured person or his dependants shall not be entitled to receive or recover from the employer of an insured person—

- (i) any compensation under the Workmen's Compensation Ordinance, 1952, or
- (ii) damages under any other law for the time being in force, in respect of an employment injury sustained as an employee under this Act.”

We set out *verbatim* that part of his judgment dealing with this point:

“In my view section 31 clearly prohibits the plaintiff or his dependants from receiving or recovering from his employer damages under any other law in respect of an employment injury sustained as an employee under the Act. The Act has very clearly extinguished the right of an employee to a common law remedy. The pertinent question to consider is whether the words ‘any other law’ cover the common law. My view is that they do.

The word ‘law’ has the meaning assigned by Article 160(2) of the Federal Constitution. (Interpretation Act 1967). Article 160(2) of the Federal Constitution defines ‘law’ to include written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof. Apart from section 31(ii) there is section 42 of the SOCSO Act that must be borne in mind. It reads—

“42. When a person is entitled to any of the benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions of any other written law.”

Section 42 prohibits an insured person from receiving damages from the employer under any other law other than the common law in respect of an employment injury. The plaintiff clearly became entitled to the benefits provided by the SOCSO Act and is therefore disentitled to receive similar benefit under any other written law.”

This judgment was considered by this court in *Che Noh bin Yacob v. Seng Hin Rubber (M) Sdn. Bhd.*<sup>(1)</sup> and we wish to reiterate that we are in complete agreement with this part of the learned judge's reasoning. In being disentitled or debarred from receiving or recovering damages under the common law, the appellant cannot therefore recover any damages for loss of amenities, pain and suffering he might otherwise recover thereunder.

That leaves us with the remaining ground viz. Is the appellant precluded from recovering damages from the 1st respondent, the lorry driver?

We were referred to section 53 of the Indian Employees' State Insurance Act, 1948 (on which, we understand, our Act is based) which reads as follows:

“53. An insured person or his dependants shall not be entitled to receive or recover, whether from the employer of the insured person or from any other person, any compensation or damages under the Workmen's Compensation Act, 1923 or any other law for the time being in force or otherwise, in respect of an employment injury sustained by the insured person as an employee under this Act.”

It will be noted that except for the words “or from any other person”, the wording is similar to our section 31.

For the appellant it was urged that the omission of the words abovementioned is deliberate so as not to prevent an injured plaintiff from suing and recovering damages from any person *other than the employer*.

In addition it was argued that whatever is recoverable from the 1st respondent cannot be reduced by this amount which is to be paid to appellant under the Act — as what he gets under the Act came from contributions towards the SOCSO fund, very similar to payment from an Insurance Company if he had been insured under an accident policy.

The learned trial judge dismissed these arguments, being of the view that the injury in respect of which appellant is claiming damages from 1st respondent is the very same injury which forms the basis of his entitlement under the Act.

With the deepest respect we disagree.

“It is presumed that the legislature does not intend to make any change in the existing law beyond that which is expressly stated in, or follows by necessary implication from, the language of the statute in question. It is thought to be in the highest degree improbable that Parliament would depart from the general system of law without expressing its intention with irresistible clearness, and to give any such effect to general words merely because this would be their widest, usual, natural or literal meaning would be to place on them a construction other than that which Parliament must be supposed to have intended. If the arguments on a question of interpretation are “fairly evenly balanced, that interpretation should be chosen which involves the least alteration of the existing law.” (See *Maxwell on Interpretation of Statutes* 12th Edn. p. 116, and the cases referred to in the foot-note).

It therefore follows that in the absence of express exclusion of fellow employees the right to recover damages from 1st respondent, a fellow employee remains.

We were also urged by Mr. Sidhu to apply the principle set out in *Bradburn v. Great Western Railway*,<sup>(2)</sup> the headnote of which reads,

“In any action for injuries caused by defendant's negligence, a sum received by the plaintiff on an accidental insurance policy cannot be taken into account in reduction of damages”

Learned counsel had, as we have remarked earlier, likened the contributions made by the employer, and in certain instances, by the employee to payments made under an insurance policy.

In England pensions, whether payable as of right or discretionary or non-contributory are likewise not deductible (see *Kemp & Kemp on The Quantum of Damages*, Vol. 1 page 152).

Section 2 of the Law Reform (Personal Injuries) Act, 1948 is a statutory exception to the general principle and provides as follows:

"(1) In an action for damages for personal injuries (including any such action arising out of a contract), there shall in assessing those damages be taken into account, against any loss of earnings or profits which has accrued or probably will accrue to the injured person from the injuries, one half of the value of any rights which have accrued or probably will accrue to him therefrom in respect of industrial injury benefit, industrial disablement benefit of sickness or invalidity benefit for the five years beginning with the time when the cause of action accrued..." (The emphasis is ours).

In the absence of such statutory provision we must perforce hold that payments recovered by the appellant under the Act are, in common law, not to be taken into account so as to reduce the damages recoverable by appellant.

In view of the finding of the learned trial judge regarding damages, special and general, payable by the 1st respondent, we allow this appeal and order the 1st respondent to pay appellant \$120,000 and the costs of this appeal.

Deposit to be refunded to appellant.

*Order accordingly.*

Solicitors: *Khoo & Sidhu; H.R. Sankey & Co.*

### GO PAK HOONG TRACTOR AND BUILDING CONSTRUCTION v. SYARIKAT PASIR PERDANA

[F.C. (Wan Suleiman F.J., Salleh Abas F.J. & Hashim Yeop A. Sani J.) June 6 & September 17, 1981]  
[Kota Bharu — Federal Court Civil Appeal No. 204 of 1980]

*Practice and Procedure — Adjournment — Request for adjournment — Message by telegram — Defendant sick — Solicitor unable to catch plane to attend trial — Discretion of court.*

This was an appeal from the decision of Mohammed Zahir J. reported in [1981] 1 M.L.J. 314. At the date of hearing in this case the defendants and their solicitors were absent. The solicitors for the plaintiffs mentioned the case and produced a telegram from the solicitors for defendants reading "Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows." The learned trial disallowed the application for an adjournment and judgment in default was entered against the defendants — appellants. The appellants appealed.

**Held**, dismissing the appeal: the granting of an adjournment is in the absolute discretion of the court depending on the facts of each case and unless it can be shown that the discretion was improperly exercised it should not be disturbed.

*Case referred to:—*

- (1) *Hup San Timber Trading Co. Sdn. Bhd. v. Tan Ah Lan* [1979] 1 M.L.J. 238.

FEDERAL COURT.

*Tan Sun Cheong* for the appellant.

*Anthony Gomez* for the respondent.

*Cur. Adv. Vult.*

**Hashim Yeop A. Sani J.** (delivering the judgment of the Court): Although the argument in this appeal was confined to a point of small dimension it reflected the declining standards in the legal profession. Briefly, the facts of this unfortunate case can be summarised as follows. The respondent (plaintiff in the court below) claimed for payment of a sum allegedly due under an agreement executed with the appellant firm. The statement of claim was filed in the High Court at Kota Bharu on December 20, 1978. After the statement of defence was filed on March 26, 1979, the suit was fixed for hearing on August 17, 1980. Notice of trial was served on the appellant's solicitors on March 20, 1980. As shown in the record of proceedings on the date fixed for hearing the plaintiff's counsel was present but both the appellant and counsel were absent. Counsel for the plaintiff tendered in court a telegram which he had received from appellant's counsel which read as follows:—

"Defendant fell sick. Unable to attend court tomorrow. Have applied postponement of hearing. Kindly mention for us as counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows. Ngan and Tan."

Not surprisingly the learned judge was taken aback and the following note appears in the record of proceedings:

"The defendants' solicitors had been notified of the date of trial as early as 20th March, 1980. They should have booked the passage earlier. There is no proper medical report from the defendant. (Telegram marked D1)

I disallowed the application for adjournment."

Judgment in default was entered against the defendant in the sum of \$63,606.98 and interest at the rate of 6% per annum from date of judgment until realization and costs. The defendant appealed.

In his argument appellant sought to rely on *Hup San Timber Trading Co. Sdn. Bhd. v. Tan Ah Lan*.<sup>(1)</sup> In that case this court held that since the judge was in some doubt as to the real reason behind the appellant's absence an adjournment should have been allowed and any delay occasioned thereby could be compensated by an award of appropriate costs. We hasten to emphasise that *Hup San Timber Trading Co. Sdn. Bhd. v. Tan Ah Lan* is distinguishable as clearly shown in the judgment at page 238 that it was only on occasions of doubt such as reflected on the facts of that case that the guiding principle should be that both parties should be given an opportunity to be heard and any delay occasioned by the adjournment could be compensated by an award of appropriate costs.

The granting of an adjournment is in the absolute discretion of the court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed. The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the courts. As stated in the grounds of judgment of the learned judge the case had been